

TAB 8



INDIGENOUS LAW ISSUES

Consent Provisions

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CONSENT PROVISIONS

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United Nations Declaration on the Rights of Indigenous Peoples (2007)

http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 29

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

International Finance Corporation Performance Standard 7 (2012)

http://www.ifc.org/wps/wcm/connect/1ee7038049a79139b845faa8c6a8312a/PS7_English_2012.pdf?MOD=AJPERES

Circumstances Requiring Free, Prior, and Informed Consent

Impacts on Lands and Natural Resources Subject to Traditional Ownership or Under Customary Use

13. Indigenous Peoples are often closely tied to their lands and related natural resources. Frequently, these lands are traditionally owned or under customary use. While Indigenous Peoples may not possess legal title to these lands as defined by national law, their use of these lands, including seasonal or cyclical use, for their livelihoods, or cultural, ceremonial, and spiritual purposes that define their identity and community, can often be substantiated and documented.

Relocation of Indigenous Peoples from Lands and Natural Resources Subject to Traditional Ownership or Under Customary Use

15. The client will consider feasible alternative project designs to avoid the relocation of Indigenous Peoples from communally held lands and natural resources subject to traditional ownership or under customary use. If such relocation is unavoidable the client will not proceed with the project unless FPIC has been obtained as described above. Any relocation of Indigenous Peoples will be consistent with the requirements of Performance Standard 5. Where feasible, the relocated Indigenous Peoples should be able to return to their traditional or customary lands, should the cause of their relocation cease to exist.

Critical Cultural Heritage

16. Where a project may significantly impact on critical cultural heritage that is essential to the identity and/or cultural, ceremonial, or spiritual aspects of Indigenous Peoples lives, priority will be given to the avoidance of such impacts. Where significant project impacts on critical cultural heritage are unavoidable, the client will obtain the FPIC of the Affected Communities of Indigenous Peoples.

Equator Principles (2013)

<http://www.equator-principles.com/>

Canadian members: Bank of Montreal, Bank of Nova Scotia, Canadian Imperial Bank of Commerce, Export Development Canada, Manulife Financial, Royal Bank of Canada, and TD Bank Financial Group.¹

Principle 5: Stakeholder Engagement

EPFIs recognise that indigenous peoples may represent vulnerable segments of project-affected communities. Projects affecting indigenous peoples will be subject to a process of Informed Consultation and Participation, and will need to comply with the rights and protections for indigenous peoples contained in relevant national law, including those laws implementing host country obligations under international law. Consistent with the special circumstances described in IFC Performance Standard 7 (when relevant as defined in Principle 3). Projects with adverse impacts on indigenous people will require their Free, Prior and Informed Consent (FPIC).

[There is no universally accepted definition of FPIC. Based on good faith negotiation between the client and affected indigenous communities, FPIC builds on and expands the process of Informed Consultation and Participation, ensures the meaningful participation of indigenous peoples in decision-making, and focuses on achieving agreement. FPIC does not require unanimity, does not confer veto rights to individuals or sub-groups, and does not require the client to agree to aspects not under their control. Process elements to achieve FPIC are found in IFC Performance Standard 7.]

¹ Equator Principles, *Members & Reporting*, online: Equator Principles <<http://www.equator-principles.com/index.php/members-reporting/members-and-reporting>>

International Council on Mining and Metals (2013)

<http://www.icmm.com/document/5433>

Canadian members: Barrick, Goldcorp and Teck.²

4. Work to obtain the consent of indigenous communities for new projects (and changes to existing projects) that are located on lands traditionally owned by or under customary use of Indigenous Peoples and are likely to have significant adverse impacts on Indigenous Peoples, including where relocation of Indigenous Peoples and/or significant adverse impacts on critical cultural heritage⁹ are likely to occur¹⁰. Consent processes should focus on reaching agreement on the basis for which a project (or changes to existing projects) should proceed. These processes should neither confer veto rights to individuals or sub-groups nor require unanimous support from potentially impacted Indigenous Peoples (unless legally mandated). Consent processes should not require companies to agree to aspects not under their control.

Boreal Leadership Council (2012)

<http://borealcouncil.ca>

Members: Alberta.-Pacific Forest Industries, Bâtirent, Canadian Parks and Wilderness Society, Decho First Nations, Desjardins Wealth Management, Domtar Inc., Ducks Unlimited Canada, Innu Nation, Kaska Nation, The Nature Conservancy, NEI Investments, The Pembina Institute, Poplar River First Nation, Suncor Energy Inc., TD Bank Group, Tembec Inc., Treaty 8 First Nations of Alberta

Free, Prior, and Informed Consent in Canada

The Boreal Leadership Council (BLC) recognizes that responsible development of natural resources within Canada's boreal region needs to integrate the principle of free, prior, and informed consent (FPIC) of Aboriginal peoples who inhabit the region.

² International Council on Mining and Metals, *Member Companies*, online: ICMM <<http://www.icmm.com/members/member-companies>>.

Saramaka People v. Suriname, Inter-American Court of Human Rights, Ser C, No 172, 28 November 2007

http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf

Throughout *Saramaka*, the Inter-American Court of Human Rights states the elements of the test in various ways. The Court requires States to obtain FPIC where the project is ‘large-scale’ and ‘would have a major impact within Saramaka territory’.³ Elsewhere, the Court adds a further dimension to this test by requiring Suriname to obtain FPIC ‘when dealing with major development or investment plans that may have a profound impact on the property rights of the members of the Saramaka people to a *large part of their territory*’.⁴ In its later interpretative judgment, the Court employs a slightly different formulation of the test. That is,

Depending upon the level of impact of the proposed activity, the State may additionally be required to obtain consent from the Saramaka people. ... when large-scale development or investment projects *could affect the integrity* of the Saramaka people’s lands and natural resources, the State has a duty not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent.⁵

Delgamuukw v British Columbia, [1997] 3 SCR 1010

Chief Justice Lamer noted that arising from the Crown’s fiduciary duty toward Aboriginal peoples, “[t]here is always a duty of consultation”. He further noted,

The nature and scope of the duty of consultation will vary within the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title...In most cases, *it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation.*[at para.168]

³ *Saramaka* (Inter-American Court of Human Rights, Ser C, No 172, 28 November 2007) 40 [134].

⁴ *Ibid* 41 [137] (emphasis added).

⁵ *Interpretation of Saramaka Judgment* (Inter-American Court of Human Rights, Ser C, No 185, 12 August 2008) 6 [17] (emphasis added).

Tsilhqot'in Nation v. British Columbia, 2014 SCC 44 (Also, Xeni Gwet'in v. British Columbia)

Para. 76 The right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders. If the Aboriginal group does not consent to the use, the government's only recourse is to establish that the proposed incursion on the land is justified under s. 35 of the *Constitution Act, 1982*

Para. 86 incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land.